IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 73 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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ILAYBAKSH KARIMBAKSH FAKIR - Appellant
Versus
STATE OF GUJARAT – Respondent

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Appearance :
MR RAVI KARNAVAT for Appellant.
MR AJ DESAI, ADDITIONAL PUBLIC PROSECUTOR for Respondent.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 10/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This appeal is filed by the original-accused against the judgment and order dated 9th December,

1998 passed by the learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No. 192 of 1990, convicting the appellant for the offence punishable under Section 302 IPC and sentencing him to imprisonment for life and fine of Rs. 5,000/- (I.D. RI for 3 months). The appellant was charged with the offence of committing murder of Sardar Babu Niyamatali, near Jantanagar Bus-Stop at Palanpur, by inflicting knife injuries that were sufficient in the ordinary course of nature to cause the death of the deceased.

2. The prosecution case was that the daughter of the appellant and the son of the deceased were married. Thereafter, they were divorced and, therefore, the appellant had enmity with the deceased. On 30th August, 1990, a Police Sub-Inspector, a Head Constable and others, who were on a patrolling duty during the anti-reservation riots in Palanpur, saw at about 10.30 A.M. the appellant and the deceased quarrelling with each other near Jantanagar Bus-Stop. Before the police party could approach the quarrelling parties, the accused inflicted knife injuries on the deceased. Thereafter, the accused was trying to run away but was caught hold of by the police party. The deceased was trying to run away in another direction to save his life and after so running for about 485 feet, the deceased fell down and succumbed to the injuries on

the spot.

3. At the trial, the prosecution examined PW 8 Police Sub-Inspector Kishansinh Kanthaji Zala (Exh. 23 Page 48), PW 4 Head Constable Jagdishchandra Surajmal Joshi (Exh. 18 Page 40) and PW 5 Assistant Head Constable Kanjibhai Jalaji Soni (Exh. 19 Page 42) as eye-witnesses to the incident. Another witness, being PW 6 Manguben Laxmanbhai Rawal (Exh. 20 Page 44) before whose house the deceased allegedly collapsed after stating that the assault on the deceased was made by the appellant, turned hostile. The prosecution also examined the *panch-witnesses*. The *panch*, who was examined to testify the *panchnama* for recovery of the blood-stained clothes of the accused, turned hostile. The prosecution also examined PW 1 Dr. Narendrakumar Chimanlal Shah (Exh. 9 Page 20), who conducted the post-mortem at 1.15 P.M. on the same day. The Constable, who had made entry at the Palanpur Police Station regarding incident, was also examined. The FSL Report was placed on record.

4. After considering the evidence on record and the arguments of the parties, the learned Additional Sessions Judge came to the conclusion that the evidence of the three police personnel was consistent and that their eye-witness account was not shaken in their cross-examination. The incident took place at

about 10.30 in the morning, the entry was in the Police Station Diary at 11.10 A.M. and the FIR was lodged at 11.30 A.M. No animosity of the police personnel was shown as to why they would falsely implicate the accused, whereas the accused had strained relation with the deceased.

The learned Trial Judge negatived the plea of *alibi* of the appellant and also the appellant's case that he was not in a position to run in view of his physical ailments. The learned Judge, accordingly, convicted the appellant for the charge of murder, but acquitted him from the charge of the offence punishable under Section 135 of the Bombay Police Act, on the ground that although the notification under Section 135 Bombay Police Act was produced, the fact whether it was given sufficient publicity was not duly proved.

Hence, the appellant has come in appeal against the said judgment of conviction.

5. At the hearing of this appeal, Mr. Ravi Karnavat, learned Counsel for the appellant-accused, has vehemently submitted as under:

(i) The appellant had no such enmity or animosity against the deceased that the appellant would ever think of causing murder of the deceased.

The appellant's daughter and the son of the deceased were married and, thereafter, divorced. Thereafter, the appellant's daughter had eloped with some other person and, therefore, if at all the appellant had any ill-feeling, it would be against the person with whom the appellant's daughter had eloped after divorce with the son of the deceased.

(ii) The incident had taken place in broad day light at 10.30 in the morning when admittedly there was no curfew in the town. There is residential area as well as shops near the place of incident and, therefore, if the prosecution case was true, there would have been eye-witnesses other than the police party also. The very fact that not a single person other than the police party had come forward as an eye-witness was sufficient ground to give reasonable doubt in favour of the appellant.

(iii) The appellant had not only stated in his written statement, as a part of further statement under Section 313 of the Code of Criminal Procedure, but also produced the prescriptions in support of the case that the appellant was suffering from such physical ailment that he would not be in a position to run and, therefore, the whole prosecution case was got-up one and the appellant was arrested from his residence only because the police party wanted to avoid embarrassment of finding out the real culprit

which revelation would have caused the upheaval in the tense situation because of the riots which had already broken out in Palanpur town.

(iv) In the alternative, it is submitted that even if the appellant was involved in the incident, the facts on record are sufficient to take the case out of Section 302 and to place it under Section 304 Part II, because even as per the prosecution case, the police party had seen the appellant and the deceased quarrelling with each other before the injuries were inflicted on the deceased. The appellant had not pre-meditated to inflict the fatal injuries on the deceased even as per the evidence led by the prosecution.

6. Having heard Mr. Karnavat, learned Counsel for the appellant, and Mr. A. J. Desai, learned Additional Public Prosecutor, we are unable to accept the submission of Mr. Karnavat, learned Counsel for the appellant, that eye-witness account of the three police personnel should not be believed only because it was a riot case, as alleged and that the police officer did not want to go after the real culprit because that might have led to escalation of the tense riot situation in the town. Apart from the fact that PW 8 PSI K. K. Zala (Exh. 23), PW 4 HC J.S. Joshi (Exh. 18) and PW 5 AHC K. J. Soni (Exh. 19) are not shown to have any animosity or ill-will against

the appellant, it transpires that the intimation about the incident which had taken place at 10.30 A.M. was conveyed on telephone at the Police Station at 11.10 A.M. and PI Mr. Chaudhary had rushed from the Police Station to the scene of offence and recorded the FIR of PSI Mr. Zala at 11.30 A.M. Since the deceased had succumbed to the injuries immediately on the spot within a few minutes, the fact that within just about 30 – 40 minutes, the information containing the name of the deceased, the name of the accused and the weapon used were conveyed to the Officer-in-Charge of the Police Station shows beyond reasonable doubt that the appellant was involved in the incident which resulted into the death of the deceased on the spot.

7. As regards the second contention urged by Mr. Karnavat, learned Counsel for the appellant, it is true that apart from the police witnesses, no other person from the locality was examined as an eye-witness and the incident is shown to have taken place at 10.30 in the morning in an area surrounded by residential houses and some shops / *pan-galla* cabins. It also appears that PW 6 Manguben Laxmanbhai Rawal, (Exh. 20) before whose house the deceased is alleged to have collapsed after stating that he was murdered by the appellant, turned hostile. The learned Trial Judge has noted that the incident did not take place on a main road but on a

kutcha road and that too at a distance of 150 feet from the main road. Moreover, the riots had already broken out and, therefore, the movement of the people in the area was bound to be sparse, if not totally absent. Of course, we find some justification in the grievance being made by the learned Counsel for the appellant that the learned Trial Judge erred in relying upon the contents of the *panchnama* wherein it was stated that at the time of making the *panchnama* (about 2 hours after the time of the incident) the shops and houses were closed. Naturally, because after the incident resulting into death of a person on the spot, the business people would down their shutters and the people in the area would close doors of their residential premises. Even so, the absence of any thing to show that the three police personnel had anything against the accused taken along with the fact that the information about the offence as well as the offender and the weapon used were conveyed to the Police Station within 40 minutes and FIR was recorded within 1 hour are sufficient to uphold the involvement of the appellant in the offence under consideration.

8. As regards the rejection of the *alibi* offered by the appellant, as per the settled legal position, the burden of proof was on the appellant. The appellant did not examine any of his family members or any other person to show the appellant's

presence at the residence, which was the case in his further statement under Section 313 of the Code of Criminal Procedure. The prescriptions produced by the appellant were given by the concerned doctor on 25th June, 1990 and 19th August, 1990. They appear to be prescriptions for muscular pain and the advice to the appellant against lifting heavy-weights and against extensive walking. Further, the appellant did not examine the doctor who had given such prescriptions. Hence, the appellant's oral statement and the two prescriptions, as aforesaid, were not sufficient to discharge the burden cast on the appellant to prove the *alibi* pleaded by him.

9. It also appears from the record that the shirt of the appellant was also seized by the police under a *panchnama* in respect of which the FSL report indicates that it had stains of blood of 'O' Group, which was also the blood-group of the deceased and which group was also found on the clothes of the deceased and on the mud from the scene of offence. This circumstance also very much goes against the appellant. Of course, the *panch* examined in support of the said *panchnama* turned hostile, but as already held by the Court in **Vahaji Ravaji Thakore & Another Vs State of Gujarat, 2003 (3) GLH 283**, the Court is not bound to discard the *panchnama* only because the *panch* has turned hostile.

10. Once the aforesaid findings given by the learned Trial Judge are not shown to have any infirmity, the question is what offence was committed by the appellant. The evidence of Dr. N. C. Shah, Medical Officer, who conducted the post-mortem at 1.15 P.M. on 13th August, 1990, indicates that the deceased sustained the following injuries:

(i) Stab-wound on right side of chest, Ist intercostal space, below right clavicle lateral end, 14.0 cms away from right sternal border, 2.5 x 1.0 cms pleural cavity deep.

(ii) Stab-wound on right tip of shoulder 2.5 cm x 0.5 cm muscle deep.

(iii) Stab-wound on right upper posterior aspect upper part 4.0 cm x 1.0 cm muscle deep.

Internal injuries corresponding to 1st injury were: the upper lobe of right side of the lung on lateral aspect bore a wound of 1.0 cm diameter; both sides of the heart were empty; and there was bleeding in pleural cavity.

In view of the aforesaid injuries and particularly the first injury, it is clear that the said injury inflicted upon the deceased was

sufficient in the ordinary course of nature to cause death.

11. The learned Counsel for the appellant has vehemently submitted that even as per the prosecution case, the appellant and the accused-deceased were quarrelling when they were seen at the scene of offence and, therefore, *Exception* 4 would apply. *Exception* 4 to Section 300 is as under:

> *"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."*

It is submitted that there is nothing on record to show that the appellant had carried a knife with him. Even the length of the blade of the knife is only about 4 inches and the width of the blade is 1 inch. It was, therefore, not such a dangerous weapon that use thereof in excitement would be treated as an intention to cause the death of the victim. There was, admittedly, a quarrel between the deceased and the appellant and the appellant had not taken any undue advantage or acted in a cruel or unusual manner. It is, therefore, submitted that all the ingredients of *Exception* 4 to Section 300 are satisfied.

12. Having heard Mr. Karnavat, learned Counsel for the appellant-accused and Mr. Desai, learned Additional Public Prosecutor, on the above issue, we find that there is no evidence whatsover to show that the appellant had carried a knife with him. In fact, PSI K.K. Zala and HC J.S. Joshi, all of whom claim to have witnessed the incident, have not said a single word as to where the knife came from. In this state of evidence, we are not in a position to hold that the appellant had premeditated to cause any injury which would in the ordinary course of nature result in the death of the victim. We are of the view, in the facts and circumstances of the case and in the absence of any strong motive proved by the prosecution, that the appellant must be given the benefit of doubt, at least on this limited aspect - whether the appellant had premeditated to inflict the injuries on the deceased. We are, therefore, of the view that the appellant deserves to be given the benefit of *Exception* 4 to Section 300. Therefore, the case goes out of Section 302 and would be covered by Section 304.

13. The next question is whether the offence would fall under Part I or Part II of Section 304. Mr. Karnavat, learned Counsel for the appellant, has vehemently submitted that in view of the material on record, at the highest, the offence would be under Section 304 Part II.

14. However, looking to the nature of the injury, particularly the first injury i.e. the stab -wound into the right lung of the deceased which was pleural cavity deep, as per the medical evidence, it appears that the knife blow was inflicted with such an intensity that it cannot be said that the appellant had no intention to cause such injury which would result into the death of the victim. We are, therefore, of the view that the appellant committed the offence punishable under Section 304 Part I IPC.

15. Coming to the question of sentence, it is true that ordinarily the sentence for the offence punishable under Section 304 Part I is 10 years, as submitted by the learned Additional Public Prosecutor. However, in the facts and in the circumstances of the case, we are of the view that interests of justice would be served if the appellant is sentenced to suffer RI for 8 years. Since the appellant was released on bail during the trial, the appellant was an under-trial prisoner for only about 4 months. It was only after conviction that the appellant was sent to jail and by now, the appellant has been in jail for about 7 years and 4 months after conviction. In our view, taking an overall view of the matter, considering the present age of the appellant and his family circumstances, the sentence of 8 years would serve the ends of justice.

16. Accordingly, we pass the following order:

O R D E R

The appeal is partly allowed. The conviction of the appellant for the offence punishable under Section 302 IPC is altered to conviction for the offence punishable under Section 304 Part I IPC. The appellant is sentenced to suffer RI for a period of 8 years and to pay fine of Rs. 3,000/- (Rupees Three Thousand Only), in default SI for 1 month. The order passed by the learned Additional Sessions Judge, Banaskantha at Palanpur, regarding *muddamal* articles shall remain undisturbed. The appeal is accordingly allowed to the aforesaid extent.

[M. S. SHAH, J.]

[H. B. ANTANI, J.]

/shamnath